Supreme Court of the United States

OCTOBER TERM, 1943

No. 232

J. M. SARTOR, ET AL., PETITIONERS

v.

ARKANSAS NATURAL GAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

H. C. WALKER, JR.,
LEON O'QUIN,
ARTHUR O'QUIN,
ELIAS GOLDSTEIN.

Attorneys for Respondent.

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Now comes ARKANSAS NATURAL GAS CORPORATION, respondent herein, and with respect shows that the opinion of this Honorable Court in this matter is erroneous and that a rehearing should be granted. The reasons for this contention are these:

1. This Court holds that the evidence is inconclusive because the eight witnesses whose affidavits were produced were either admittedly or apparently in the same position as the respondent and therefore consciously or unconsciously biased. This was not the opinion of the district judge, who is familiar with the Richland gas field, its history and development, the various large companies operating there, the independent operators like Hunter and Feazel, and the part they have played in the develop-

ment of the field and the making of a price for the gas produced therefrom. He knew as well as the litigants the local situation; and he accepted the proof as to the 3¢ market price on the basis of his own knowledge and his own judgment as to the character, information, experience and credibility of the several witnesses. It is familiar law that in regard to the credibility of witnesses the opinion of the district judge is entitled to controlling weight.

This Court, possessing no such basis for an informed judgment, has reversed the ruling of the district judge on an assumption of bias, which as to at least two of the witnesses is not even colorably justifiable. Eliminate if you will all other witnesses save Hunter and Feazel—both of whom are individual operators of the hardy and independent type with which the oil industry abounds—and we still have a case where the evidence is all for the respondent.

2. We respectfully submit that what has been overlooked here is the entire absence of evidence for the petitioners. If cross examination of respondent's eight witnesses would have brought out facts different from those stated in the affidavits, petitioners were strangely silent in the district court in the matter of asking that court to permit such cross examination. In his affidavit (**R. 42, 43**) the learned counsel for petitioners says that it is "impossible for plaintiffs in this case to produce the affidavits of persons expert in the price of gas * * * because all of said persons are hostile to plaintiffs".

In other words, we have here a case in which the district judge, residing in a gas producing territory, familiar with its practices, its standards and its personnel, is presented with the sworn statements of witnesses whom he considers credible and informed, all of whom testified that a wellside price of 3¢ per MCF existed in the Richland Field during the first three years of production from it. No evidence

is offered to the contrary. We have, then, the exact situation with which Rule 56 was intended to deal.

3. If it be wise and commendable to first build up and then tear down, the decision here rendered should be permitted to stand, otherwise not; for its baffling effect must be to largely neutralize the work of committee and court in preparing and adopting Rule 56 of the Federal Rules of Civil Procedure. However viewed, the holding here is that even though the evidence proffered on a particular issue under that rule wholly supports the defense and wholly controverts the plaintiffs' case, the court must nevertheless go through with the formality of a trial—the very thing that Rule 56 was intended to stop.

Both the district court and the Court of Appeals found as a fact that the supporting affidavits showed that during the first three years of production from the Richland Field there was a market at the well for the gas and the market price was no more than 3¢. The fact that a jury found differently as to the average market price over a period of subsequent years is treated as having controlling weight, thus ignoring the difference in conditions and also ignoring the fact that the numerous juries before whom these market price cases have been tried have fixed in each case a different market price, the last price fixed being 3¢ or less.[1]

Note 1: See, for example:

Arkansas Natural Gas Company v. Sartor,
78 Fed. (2d) 924—4½¢;

United Gas Public Service Co. v. Pardue,
78 Fed. (2d) 929—4.45¢;

Union Producing Company v. Driskell,
117 Fed. (2d) 229—4¼¢;

Hemler v. Hope Producing Company,
117 Fed. (2d) 231—3¢;

We say again that if under the circumstances of this case the district judge may not validly determine that there is no real issue of fact to be tried, Rule 56 has no meaning and those who so laboriously wrought it into being wasted their labor.

We respectfully submit that a rehearing should be granted.

HENRY C. WALKER, JR.,
LEON O'QUIN,
ELIAS GOLDSTEIN,
ARTHUR O'QUIN,

Attorneys for Respondent.

* * * *

I, Elias Goldstein, one of the counsel for respondent in this case (petitioner for rehearing), do hereby certify that this petition for rehearing is presented in good faith and not for delay.

ELIAS GOLDSTEIN.